

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

January 7, 2010

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RE: Richard J. Sternberg, M.D. v. Nanticoke Memorial Hospital, et al.
C.A. No. 07C-10-011(THG)

Dear Counsel:

The Court has previously determined that an award to Defendants for the costs of defending this litigation, including reasonable attorney's fees, was authorized by Federal law and was appropriate in this case. Sternberg v. Nanticoke Mem'l Hosp., Inc., 2009 WL 3531791, at *31 (Del. Super. Sept. 18, 2009).

After Defendants' attorney filed his affidavit, as requested by the court, Sternberg attempted to reargue the issues. The Court denied the reargument attempt as being tardy, thus the Court lacked jurisdiction. The Court went on to address the substantive issue involving the claim that the decision to award attorney's fees was premature because the record was incomplete. In summary, the attempted reargument application was denied. Sternberg v. Nanticoke Mem'l Hosp., No. Civ. A. S07C-10-011 (Del. Super. Dec. 9, 2009).

Sternberg argues that the Court should use an earlier Rule 11 decision in this case as a template for the present decision.

Earlier in this case, I ordered Rule 11 sanctions and an attorney's fee award against Defendants. Sternberg v. Nanticoke Mem'l Hosp., 2009 WL 930578 (Del. Super. Mar. 18, 2009) (granting Sternberg's Rule 11 motion for sanctions); Sternberg v. Nanticoke Mem'l Hosp., 2009 WL 2219984 (Del. Super. Apr. 29, 2009) (granting \$7,500.00 in attorney's fees to Sternberg for the costs of pursuing the Rule 11 Motion). In same, the Court discussed the contentious relationship between the parties and the reasons that the Rule 11 attorney's fees award was capped at \$7,500.00.

My reasoning was spelled out in those decisions and need not be revisited here. The Rule 11 decision involved a small battle in a major war. The fees outlined in 42 U.S.C. §11113 consider the war itself. If it is determined by the Court that the lawsuit was frivolous, unreasonable, without foundation or in bad faith, then the Court "shall" award the costs of defending the claim. The purpose of the Federal statute is to encourage doctors and other professionals to serve on peer review committees without the fear or concern of going into their own pockets to defend unfounded or bad faith litigation. See Smith v. Ricks, 31 F.3d 1478, 1487 (9th Cir. 1994).

Simply put, sanctions for a Rule 11 violation and the award of costs under the Federal statute address separate problems and issues. To use the Rule 11 award as a template in the present decision would be unreasonable and incorrect.

In determining an award of reasonable attorney's fees, the Court applies the guidelines provided by the Supreme Court in considering any attorney's fee award. General Motors Corp. v. Cox, 304 A.2d 55 (Del. 1973).

The Cox Court held:

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fees customarily charged in the locality for similar legal services.

- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

304 A.2d at 57.

Mr. Hackett's affidavit evidences \$20,966.72 in costs and \$268,668.50 in attorney's fees covering October 2007 through the summer of 2009.

Mr. Hackett's hourly fee for his services from October 15, 2007, through late December 2008, was \$200.00 an hour. Beginning in late December 2008, his fee increased to \$250.00 per hour. Mr. Hackett is a senior member of the Bar who has represented Nanticoke Memorial Hospital for decades. His fees are within the range customarily charged by experienced attorneys in Sussex County. I find his hourly rate to be reasonable.

Mr. Hackett did not include the time involved in pursuing and then defending the counterclaim which was the subject of the Rule 11 decision.

Included in the attorney's fees application were 69.9 hours for work performed by two associates in the office of Mr. Hackett. Their time was billed at the same rate as Mr. Hackett. I have reduced this portion of the attorney's fee request by \$3,495.00 reflecting a reduction in \$50.00 per billed hour for the associates.

I also note that this case involved complex issues requiring much research by all involved.

I note that Plaintiff filed suit against Nanticoke Memorial Hospital, its Chief Executive Officer, and the fourteen (14) physicians that made up Nanticoke Medical Executive Committee. Discovery depositions of all parties, as well as staff and other potential witnesses, were obviously time-consuming. The time involved precluded defense counsel from other employment.

As is my practice when considering an award of attorney's fees, I also asked Plaintiff for his attorney's fees. Sternberg's counsel reported an expenditure of approximately \$406,000.00 in attorney's fees, with litigation costs totaling \$448,667.50. Plaintiff's counsel represented one party. Defense counsel represented over a dozen parties. Defendants' attorney's fees are well within the ballpark of being reasonable, both as to the time involved and the fees charged.

The work performed by Defendants' attorney was useful and necessary, and it concluded in a positive result for his client.

Therefore, the award to Defendant, Nanticoke Memorial Hospital, et al, of costs and reasonable attorney's fees, is \$20,966.72 in costs and \$265,173.50 in attorney's fees. (\$268,668.50 less an adjustment of \$3,495.00 for the work done by Mr. Hackett's associates).

A final comment is required. Dr. Sternberg argues that he should not be saddled with these attorney's fees because his expenditure of \$448,667.50 should establish his good faith in filing the lawsuit against Nanticoke Memorial Hospital and the fourteen (14) doctors on the peer review committee.

When Dr. Sternberg chose to get into this fight, he knew that he had given up the opportunity to contest the many allegations against him at a due process hearing. He knew he had successfully negotiated the precautionary suspension out of existence. It is gone and not a part of his record.

Presumably, Dr. Sternberg entered into this litigation mindful of the federal peer review law that has been applied by the Court. Presumably, he knew the burdens that law placed in his way and, presumably, he knew the potential financial costs if he did not prevail. He did not prevail.

Therefore, I find it appropriate that he carry the financial burden as to this litigation rather than the hospital and peer review doctors.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

THG:baj
cc: Prothonotary